Canada Industrial Relations Board Conseil canadien des relations industrielles

C.D. Howe Building, 240 Sparks Street, 4th Floor West, Ottawa, Ont. K1A 0X8
Édifice C.D. Howe, 240, rue Sparks, 4e étage Ouest, Ottawa (Ont.) K1A 0X8

Reasons for decision

Mr. George Court

complainant,

and

Teamster Local Union No. 879

respondent,

Board File: 27119-C
2011 CIRB **567**
February 7, 2011

The Board was composed of Mr. William G. McMurray, Vice-Chairperson, and Messrs. Patrick Heinke and John Bowman, Members. A hearing took place in Toronto, Ontario, on December 7 and 8, 2009, and April 20, 21 and 22, 2010.

Appearances

Mr. George Court, on his own behalf;
Mr. G. James Fyshe, for Teamsters Local Union No. 879.

These reasons for decision were written by Mr. John Bowman, Member.

I–Introduction

[1] Mr. George Court (the complainant) was employed as a truck driver by John Grant Haulage Ltd. (the employer). Teamsters Local Union No. 879 (the union) is the certified bargaining agent for the employees in the bargaining unit.

[2] On October 24, 2008, the complainant filed a complaint with the Board alleging that the union violated its duty of fair representation under section 37 of the *Canada Labour Code (Part I – Industrial Relations)* (the *Code*). The complainant alleged that the union acted in an arbitrary and discriminatory manner, and in bad faith, when it failed to properly represent him regarding a number of grievances that he filed, including a grievance concerning the termination of his employment in July 2008.

II–Background

[3] The Board heard evidence from four witnesses: the complainant, Mr. George Court, Mr. Ralph Shepley, General Manager of John Grant Haulage Ltd., Mr. Bob Gaumont, a shop steward employed at John Grant Haulage Ltd., and Mr. Ernie Bishop, Business Representative for Teamsters Local Union No. 879. What follows is a summary based on the evidence provided by these witnesses, as well as the documentary evidence provided by the parties.

[4] The employer is a bulk carrier whose trucks mainly haul materials used in the manufacture of cement and resin. The complainant was hired in February 2008. He concluded his probationary period and became a member of the union on March 24, 2008.

[5] Teamsters Local Union No. 879, based in Hamilton, Ontario, is certified to represent the employees at John Grant Haulage Ltd. At the workplace level, there is a Chief Shop Steward who is assisted by other shop stewards at the workplace. The role of the stewards is to receive grievances from the employees, investigate the grievances as required and hold a step 1 grievance meeting with management. The grievor may or may not be present at the step 1 meeting depending on availability. During the year 2008, elections were held for the position of Chief Shop Steward at the workplace.

Mr. Bob Gaumont and Mr. Jeff Seaton both held the position of Chief Shop Steward during the time period relevant to this complaint.

[6] The union employs full-time Business Representatives who are responsible to provide service to the members in the bargaining units to which they are assigned. Business Representatives attend meetings at step 2 and above during the grievance procedure and, in conjunction with the Local Union officers, make decisions on whether grievances will be arbitrated, settled or withdrawn. Mr. Ernie Bishop was the Business Representative responsible for the bargaining unit at John Grant Haulage Ltd. in 2008.

[7] Article 8 of the collective agreement between the parties sets out the grievance procedure at this workplace. An employee is supposed to first discuss the issue with a supervisor, prior to filing a formal grievance. Step 1 of the grievance procedure is to be initiated "within five (5) days...from the time the complaint arose or was known to the employee."

[8] The Board heard detailed evidence regarding thirteen grievances that were filed by the complainant between April and August 2008 (The complainant alleged that there were some additional grievances that the union did not pursue, but these were not relevant to the complaint). The Board heard evidence concerning the following grievances:

Grievance 06800 dated April 25, 2008 regarding a half-hour deduction from the complainant's paycheck;

Grievance 06802 dated May 9, 2008 regarding a one-day suspension issued to the complainant for allegedly not following company policy;

Grievance 06796 dated June 5, 2008 regarding a 15-minute deduction from the complainant's paycheck;

Grievance 06804 dated June 10, 2008 regarding the assignment of work by seniority;

Grievance 05581 dated June 18, 2008 regarding a three-day suspension issued for alleged verbal abuse to the dispatcher;

Grievance 05582 dated June 20, 2008 regarding alleged harassment towards the complainant by supervisors and the dispatcher;

Grievance 05580 dated July 11, 2008 regarding the employer sending him home on that day after

he had reported for work;

Grievance 05578 dated July 11, 2008 regarding 15-minutes pay allegedly owed for July 4, 2008;

Grievance 05583 dated July 11, 2008 regarding a reprimand issued to the complainant for allegedly falsifying a log book;

Grievance 05594 dated July 28, 2008 regarding the complainant's termination from employment, which occurred that day;

Grievance 05593 dated July 28, 2008 regarding assignment of work by seniority;

Grievance 06956 dated July 28, 2008 regarding vacation pay allegedly owing on the complainant's final paycheck;

Grievance 06957 dated August 1, 2008 regarding payment for the day that the complainant was suspended (July 11, 2008);

[9] The complainant testified that the first nine of the grievances on the list above were given to a shop steward to file on his behalf. The last four grievances were dropped off by the complainant at the local union office in Hamilton, Ontario, on or about August 1, 2008.

[10] Grievance 06800 was discussed at a grievance meeting on June 20, 2008 at which the complainant, a shop steward and the employer attended. The grievance was resolved on the basis that the employer would pay the complainant the half hour of pay that was sought. When the complainant received a paycheck after this meeting, he noted that the pay was added and then deducted from the cheque. The union raised the issue with the employer again at a meeting on July 28, 2008 and the matter was resolved on the basis that the employer would pay the monies owing.

[11] Grievance 06802 was in response to a one-day suspension issued to the complainant. When he was unable to contact the employer over the radio, the complainant returned to the company premises with a loaded truck. The employer issued the one-day suspension due to a violation of procedure, as set out in the company policy manual. The complainant was supposed to call the employer by telephone if there was a problem with the radio, instead of bringing a fully-loaded truck back to the employer's yard. The complainant testified that, when he returned to the company premises, he noticed that the cord to the radio had become unplugged. The grievance was discussed at a grievance meeting on July 28, 2008 and was denied by the employer. The union concluded that

the complainant was in breach of company policy and advised the complainant by letter dated August 5, 2008 that it had withdrawn the grievance.

[12] Grievance 06796 concerned a deduction of 15 minutes of overtime from the complainant's pay. The complainant had washed his truck after finishing his shift and put in an overtime claim for the 15 minutes that it took to do it. The claim was not paid by the employer, on the basis that the complainant should have requested permission before incurring overtime to wash the truck. The union withdrew the grievance at step 1 of the grievance procedure, because it agreed with the employer's interpretation of its past practice. The union did not provide evidence that it advised the complainant about this withdrawal.

[13] Grievance 06804 was filed after the complainant became concerned that drivers with less seniority than him were being given work while he was at home. The complainant testified that he raised this issue before with a shop steward, but nothing was done about it. When he approached a different steward, the grievance was filed. The grievance claimed that drivers were dispatched out of seniority before the complainant on various dates in April, May and June 2 and 4, 2008. The grievance was discussed at a meeting between the union and the employer on July 28, 2008 and was denied by the employer. The union determined that the grievance was untimely, as it concerned events that occurred more than five days before the grievance was filed. The union advised the complainant by letter dated August 5, 2008, that it had withdrawn the grievance.

[14] Grievance 05581 was filed in response to a three-day suspension issued to the complainant for allegedly swearing at a dispatcher. The shop stewards interviewed the dispatcher, who confirmed to them that the complainant had acted in an abusive manner towards her. The grievance was discussed at meetings on June 20 and July 28, 2008 and the employer maintained its position. While the complainant denied the accusations, the union concluded, based on its investigation, that the complainant did verbally abuse the dispatcher. The union advised the complainant by letter dated August 5, 2008, that it had withdrawn the grievance.

[15] Grievance 05582 was filed after the complainant alleged that he had been harassed and discriminated against by company supervisors and dispatchers. On June 12, 2008, prior to the filing of this grievance, the complainant sent a letter to the employer asking it to investigate certain incidents of harassment and discrimination against him. The company referred the issue to the Joint Health and Safety Committee to investigate. The committee is made up of management and employee representatives. The two employer representatives on the committee were two of the managers that the complainant had accused of harassing him. The committee did not interview the complainant prior to concluding its investigation. The committee issued a report dated July 29, 2008 by which time the complainant's employment had already been terminated. The report stated that the complainant's allegations were unfounded. The union accepted the report of the committee and, on that basis, it advised the complainant by letter dated August 5, 2008, that it had withdrawn the grievance.

[16] Grievance 05580 arose from an incident on July 9, 2008, when it was alleged that the complainant did not respond when the employer tried to contact him on the radio. The complainant was called into a meeting later that day to discuss the incident. While the complainant testified that he was issued a written reprimand for the incident, such reprimand was not included in the disciplinary record that was placed in evidence by the employer. The complainant was sent home early following the meeting. The union withdrew the grievance on the basis that there was no written reprimand in the complainant's file, and based on its understanding that the complainant was paid an additional thirty-minute pay to make up for being sent home early. The union advised the complainant by letter dated August 5, 2008, that it had withdrawn the grievance.

[17] Grievance 05578 was filed after the complainant was deducted 15 minutes of overtime for work performed on July 4, 2008. The employer refused to pay the overtime on the basis that the complainant was washing his truck after the end of his shift and did not have permission from dispatch to do that at the company's expense. The union was concerned that the amount had been deducted from the complainant's pay, but decided not to pursue the grievance, because it believed the complainant could have been disciplined for time theft if the money was not deducted. The union advised the complainant by letter dated August 5, 2008, that it had withdrawn the grievance.

[18] Grievance 05583 was filed in response to a written reprimand issued to the complainant on July 11, 2008. The complainant had refused to operate a certain truck on that day, stating that the air-conditioning on the truck was not working and he was exercising his right to refuse unsafe work. The complainant was asked if he had mentioned the fact the air conditioning was not working in the log book when he drove the same truck the previous day, and he said he had. The manager asked the complainant to get the log book from the truck, while he went to find the copy from the company office. The complainant got the log book from the truck, then went to the company office and allegedly altered the log book and the copy, to show that he had mentioned that the air-conditioning was not working on the previous day, when he had not done so. The manager checked the log book page before and after the complainant handled the log book and was able to confirm the alteration had occurred. The complainant was sent home while the incident was investigated, and was given a written reprimand. The union reviewed the evidence that the employer had obtained and concluded that the complainant had altered the log book. The union also considered the fact that under the company rules and regulations, which are appended to the collective agreement, a falsification of a time card or trip report is subject to dismissal for a first offence. The union advised the complainant, by letter dated August 5, 2008, that it had withdrawn the grievance.

[19] Grievance 05594 was filed in response to the employer's decision to terminate the employment of the complainant. The grievance was discussed in the July 28, 2008 meeting between the union and the employer. The complainant was present for part of the meeting. After considering the employer's evidence, the union believed that the complainant had falsified the log book and, given previous progressive discipline that had been issued to the complainant, that his termination was justifiable. For the same reasons it did not pursue grievance 05583, the union decided to withdraw this grievance. The union did not specifically mention this grievance in its letters to the complainant notifying him of the grievance withdrawal; however, it appears that the union considered grievances 05583 and 05594 together as both related to the same event.

[20] Grievance 05593 was filed after the complainant was terminated from his employment. It concerned an allegation that the employer dispatched drivers with less seniority than the complainant ahead of him, on various dates in June 2008 and July 2, 2008. The union determined that the grievance raised issues that were beyond the five-day time limit set out in the collective agreement.

No meeting was held with the employer regarding the grievance; the union did not talk to the complainant regarding the grievance; and there was no notification to the complainant from the union regarding the decision not to pursue the matter.

[21] Grievance 06956 was also filed after the complainant was terminated from his employment. It alleged that the employer had not paid him the proper amount of vacation pay owing when it issued his final paycheck. The union did not pursue the grievance, on the basis that there were no details on the grievance form indicating the basis for the claim. The union did not notify the complainant that it was not pursuing the matter. The complainant also pursued this matter by filing a complaint on August 18, 2008 with Human Resources and Skills Development Canada (HRSDC). On January 15, 2009, HRSDC sent a letter to the complainant dismissing his complaint on the basis that the employer had paid the correct amount of vacation pay to him.

[22] Grievance 06957, also filed after the complainant's employment had been terminated, sought payment of eight hours of pay, for the day that the complainant had been initially suspended from work (July 11, 2008). The union determined that the grievance would not be successful, on the basis that the complainant was suspended from employment as of that day. The union believed the employer had just cause for the discipline, therefore, no wages were payable. The union did not hold any meetings with the employer regarding this grievance, nor did it advise the complainant that it was withdrawing the grievance.

[23] The complainant testified that, once he filed the grievance regarding the half hour of pay (grievance 06800), he felt that he was targeted by the employer. The complainant also testified that, while the shop stewards told him he could file grievances on the various issues, he believed that the union did not investigate the concerns that he raised, and often did not communicate with him about what was happening once the grievances were filed. The complainant became frustrated with the union and was impatient with the lack of progress regarding the issues that he was raising.

[24] The witnesses from the union and the employer testified about meetings on June 20, July 9, and July 28, 2008, which were attended by the complainant, as well as union and employer representatives. They testified that the complainant was disruptive at these meetings, frequently

interrupting the employer representatives, and walking out of meetings before they were finished. In one of the meetings, a shop steward told the complainant to "shut up." At the meeting on July 28, 2008, when the complainant's suspension pending investigation was being discussed, it was alleged that he accused the company owner, who was present at the meeting, of lying. The meeting ended shortly thereafter, and the complainant was advised that his employment was terminated. For the most part, the complainant did not dispute these allegations, but argued that the Board should focus on the union's conduct and not what he allegedly did at the meetings.

[25] The Board heard considerable evidence on the events leading up to the July 28, 2008 meeting. The union's Business Representative testified that he phoned the complainant earlier on the day of the meeting to go over the grievances with him. The complainant told him that he was not ready to speak with him at the time because he needed to get his notes. As a result, the Business Representative did not meet with the complainant until shortly before the meeting. A brief meeting was held in the company parking lot. The complainant asked to have his fiancée come with him to the meeting. The union denied the request. The Business Representative did not have copies of all of the grievances that had been filed. The meeting with the employer commenced. Before all of the grievances could be discussed, the owner of the company called a halt to the meeting and advised the complainant that his employment was terminated. The complainant left the meeting and was escorted off the property by the Business Representative. The meeting reconvened and some of the other grievances filed by the complainant were discussed in his absence.

[26] At the same time that the complainant filed his duty of fair representation complaint under section 37 of the *Code*, he also filed a separate complaint against the employer alleging that his employment had been terminated as a result of him exercising his right to refuse unsafe work, contrary to section 147 of the *Code* (Board file no. 27121-C). This complaint was heard by a different panel of the Board, and it was decided prior to the conclusion of the hearing in this matter.

[27] In its decision, *George Court*, 2010 CIRB 498, the Board found that the employer had breached section 147 of the *Code*. The panel also found that the complainant had altered the log book as alleged by the employer. Given these findings, the Board did not reinstate the complainant, but ordered the employer to pay him for a period of just over three months from the date his termination took effect.

III–Positions of the Parties

A–The Complainant

[28] The complainant submitted that the union did not make a reasonable effort to represent him once grievances were filed. The complainant alleged that the union did not investigate the grievances; that it displayed a "non-caring" attitude towards him; that it failed to provide him with any reasoned explanation for why it was withdrawing the grievances, and failed to give him an opportunity to rebut the evidence from the employer that it was relying on. The complainant further submitted that the Business Representative did not properly prepare for the July 28 grievance meeting and did not contact him far enough ahead of the meeting to give him a fair opportunity to discuss the issues ahead of time.

[29] As a remedy for the alleged breach of section 37 of the *Code*, the complainant seeks that all of his grievances, except those relating to the termination and the events of July 11, 2008 and subsequent, be referred to arbitration with the complainant being allowed representation by counsel of his choice, at union expense. The complainant also sought an order extending the time limits for all of the grievances; an order that the union post the Board's decision on its website; an order refunding all dues and fees that he paid to the union; and an order requiring a written apology from the union. The complainant recognized that this Board had considered the issues related to his suspension on July 11, 2008 and his subsequent termination in his complaint against his employer, and he therefore acknowledged that the Board had awarded him a remedy in that regard in *George Court*, *supra*. Accordingly, at the argument stage of the hearing, he advised this panel that he was not asking for any further or additional remedy or compensation related to those same issues in the context of our decision on his complaint against his union.

B–The Union

[30] The union submits that it did not act in an arbitrary or discriminatory manner, or in bad faith, in its representation of the complainant. The union submits that the Board does not have to agree with how the union handled a grievance, or determine the likely merits of the grievances. Instead, the Board must look at the process that the union followed in reaching its decisions on the grievances. The union submits that it did investigate the grievances before making its decision. In the case of the disciplinary grievances – the two suspensions and the termination – the union concluded that the complainant had committed the acts that he was disciplined for, and that the penalties issued by the employer were consistent with progressive discipline. The decisions of the union regarding such grievances were not arbitrary.

[31] The union further submits that, before making a final determination on the various grievances, the Business Representative obtained information from the shop stewards, who had handled the individual grievances, along with documentary evidence provided by the employer. On the basis of such evidence, the Business Representative came to reasoned decisions regarding the various grievances. The union also submitted that the complainant was not cooperative in assisting the union in its handling of his grievances, noting his disruptive behavior during grievance meetings and his refusal to speak to the Business Representative when he called him prior to the meeting on July 28, 2008.

IV–Analysis and Decision

[32] The complainant alleges that the union has violated section 37 of the *Code*, which reads:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[33] While the complainant argued that the union acted in an arbitrary and discriminatory manner, and in bad faith in its handling of his various grievances, the main thrust of his complaint was that the union represented him in an arbitrary manner. He alleged that the union did not properly

investigate his grievances, did not communicate with him during the grievance process, and did not provide him with a proper explanation about its decisions not to pursue many of his grievances. These issues are all relevant to the question of whether the union acted in an arbitrary manner in representing the complainant.

[34] Employees do not have the absolute right to have their grievances taken to arbitration by the union. The Board normally looks at the process that the union followed in reaching its decision not to take a particular grievance to arbitration. As long as the union makes a reasoned decision, based on some investigation of the merits of the case and a weighing of the relevant evidence, the union will not be found to have breached its duty of fair representation under section 37 of the *Code* (see *Virginia McRae Jackson*, 2004 CIRB 290, par. 19 and 33).

[35] In this case, the Board heard evidence that, before reaching his decision on the complainant's various grievances, the Business Representative of the union spoke to the shop stewards who did the initial investigation of the grievance; reviewed the evidence obtained from the employer including relevant documents, and then made a decision on the merits of the grievance. While there were some deficiencies in the manner in which the union conducted itself, the Board does not find that the union contravened its duty of fair representation under section 37 of the *Code*.

[36] For example, on the major disciplinary grievances involving a one-day suspension, a three-day suspension and the termination of the complainant's employment, the union reached its decision not to pursue the grievances after reviewing the relevant evidence. On the first case, it was not disputed that the complainant returned to the employer's yard with a fully-loaded truck, instead of delivering the load to the customer. While the complainant argued that he had not been trained sufficiently, the union concluded that, between the training he had received and the policy as set out in the company policy manual that the complainant had received, the complainant had breached company policy and the discipline was appropriate. The three-day suspension concerned an allegation that the complainant had verbally abused a dispatcher. While the complainant denied the allegation, the stewards interviewed the employee who made the complaint and determined that her evidence was credible. On that basis, the union did not pursue the case to arbitration. In the case of the termination grievance, although the complainant denied the allegation that he falsified the log book, the employer

provided evidence that cast some doubt on the complainant's version of events. The union concluded that it was probable that the complainant had falsified the log book and that, given previous discipline over a relatively short period of time, the penalty of discharge was not excessive. In the Board's view, the union's assessment of these grievances was not unreasonable and was based on a fair consideration of the evidence in each case.

[37] Although the Board does not find that the union breached its duty of fair representation, the Board understands why the complainant was frustrated with the way the union handled his various grievances. The union did a generally poor job of keeping the complainant informed about what was happening with his grievances. It also failed to provide a reasoned explanation to the complainant as to why it was not proceeding with many of the grievances. While the union would not win any awards for the quality of union representation provided to the complainant, the Board's role is not to act as a quality control inspector, but to consider the relatively narrow issue of whether the union's conduct was arbitrary, discriminatory or in bad faith.

[38] The Board also finds that the complainant did not help himself or the union at some points in the process. The Board accepts that the complainant acted at times in a disruptive manner during grievance meetings, and that he did not follow the union's advice at those meetings. The Board also finds that the complainant should have been more cooperative with the Business Representative when he was called on July 28, 2008 to discuss his various grievances prior to the meeting later that day. As the Board noted in *Virginia McRae Jackson, supra*:

> [15] The union's duty of fair representation is predicated on the requirement that employees take the necessary steps to protect their own interests... They must cooperate with their union throughout the grievance procedure, for example by providing the union with the information necessary to investigate a grievance...
>
> [16] Employees must follow the union's advice as to how to conduct themselves while the grievance process is underway...

[39] For the reasons noted above, the Board finds that the union did not act in a manner that was arbitrary, discriminatory, or in bad faith in its representation of the complainant, and did not violate its duty of fair representation under section 37 of the *Code*. The complaint is therefore dismissed.

[40] This is a unanimous decision of the Board.

William G. McMurray
Vice- Chairperson

John Bowman
Member

Patrick Heinke
Member